



**THE ATTORNEY GENERAL  
OF TEXAS**

October 8, 1990

**JIM MATTOX  
ATTORNEY GENERAL**

Honorable Robert T. Jarvis  
Grayson County Attorney  
Grayson County Justice Center  
Sherman, Texas 75090

LO-90-73

Dear Mr. Jarvis:

You ask whether a home rule municipality may terminate a perpetual care trust originally created under the provisions of former V.T.C.S. article 912a-15. The brief accompanying your request also asks whether a municipality governed by former article 969c is prohibited from terminating the trust pursuant to former article 969c-1 if the population of the county is not within the limits specified in the statute. Each of these statutes was recently repealed and recodified as part of the Health and Safety Code. Acts 1989, 71st Leg., ch. 678, § 13, at 3165; Health & Safety Code §§ 712.021-712.029, 713.002-713.008, 713.010.

Your questions are submitted at the request of the city of Sherman, a home rule city located in Grayson County that administers a perpetual care trust fund. It seeks to determine its authority to (1) terminate the perpetual care trust fund, (2) deposit the principal of the trust in the city's general revenue fund, and (3) apply the deposited amount to the maintenance and improvement of the cemetery.

The brief attached to your request explains that in 1923 the Sherman Mausoleum and Memorial Park Association sold to the city all of its cemetery property on the condition that the city set aside money from the sale of lots in the cemetery for the purpose of perpetual care. In 1952, the city agreed to become legal owner of all property and assets controlled by the association and specifically agreed to the conditions concerning perpetual care, presumably including the stipulation that the city either establish or continue a perpetual care trust fund. Six years later the city council authorized the appointment of a local bank to act as trustee of the perpetual care trust fund, and a trust agreement was drawn in accordance with former article

912a-15, V.T.C.S. (now sections 712.021 through 712.029 of the Health and Safety Code).

The city maintains the cemetery with income generated by the principal of the trust fund. The income from the trust has been insufficient to meet the expenses of maintaining the cemetery property, and the city has supplemented the trust income with city funds. The trust fund currently has a principal balance of over \$400,000.00. The city now seeks to dissolve the trust, deposit the principal balance in the city treasury, and apply those funds to cemetery maintenance.

A home rule municipality derives its authority to regulate cemeteries from its home rule charter. Ex parte Adlof, 215 S.W. 222 (Tex. Crim. App. 1919). This rule follows well-established principles of home rule, some of which are described below.

A home rule city draws its power directly from article XI, section 5, of the Texas Constitution, rather than from the legislature as is the case with general law cities. See Lower Colorado River Auth. v. City of San Marcos, 523 S.W.2d 641, 643 (Tex. 1975). It has full power of self government and may exercise any power not denied by the constitution, its charter, or general laws. Id. at 643-644. Acts of the legislature, therefore, serve not as grants of power to home rule cities, but only as limitations on their power. Id. at 643 (quoting Forwood v. City of Taylor, 214 S.W.2d 282 (Tex. 1948)).

Four sections or subchapters of the Health and Safety Code contain provisions governing the establishment and administration of trust funds for cemetery purposes. They are section 711.005 (pertaining to trusts for the care of private plots or structures in nonperpetual care cemeteries), subchapter B of chapter 712 (applying to cemetery associations), subchapter A of chapter 713 (applying to municipalities), and subchapter B of chapter 713 (applying to counties). Subchapters B of chapter 712 and A of chapter 713 are relevant to your request.

Subchapter B of chapter 712 of the Health and Safety Code, sections 712.021 through 712.029, is derived from former article 912a-15. These provisions govern the organization, operation, and regulation of perpetual care cemeteries by cemetery associations. A cemetery association is defined by section 711.001 of the code as any corporation or association not operated for a profit that is authorized by

its articles of incorporation to conduct any one or more of all of the businesses of a cemetery.

Prior to 1963, article 912a-15 applied to cemetery associations and to municipalities and other political subdivisions operating perpetual care cemeteries. See Acts 1963, 58th Leg., ch. 495, at 1298 (deleting references to cities and political subdivisions). Thus, the appointment of a trustee for the perpetual care trust fund by the city council of Sherman in 1958 was consistent with its duties under article 912a-15 as then written. See V.T.C.S. art. 912a-15 (1953); Health & Safety Code § 712.021.

Your brief, identifies former articles 969c and 969c-1, governing the operation of perpetual care cemeteries by certain cities, and asks what effect they have on the power of the city of Sherman to terminate its perpetual care trust fund. Articles 969c and 969c-1 were repealed and recodified as sections 713.002 through 713.008, and 713.010 of the Health and Safety Code. Immediately prior to its repeal, section 1 of article 969c provided that "[a]ny incorporated or chartered city or town within the State of Texas, owning, operating, or having control of any cemetery or cemetery property" could act as "permanent trustee for the perpetual care and upkeep of the lots and graves in such burial grounds." As now codified, the provision states that a "municipality that owns or operates a cemetery or has control of cemetery property may act as a permanent trustee for the perpetual maintenance of the lots and graves in the cemetery." Health & Safety Code § 713.002(a).<sup>1</sup> The trust created under these provisions is called a "perpetual trust." Id. § 713.003(c). The municipality may determine the amount necessary for the permanent maintenance of graves and burial lots and may "accept" that amount on behalf of the donor or decedent. Id. 713.003(a), (b).

Under subchapter A of chapter 713, the municipality itself acts as trustee for the perpetual trust. The municipality may invest the deposits made to the fund in interest-bearing bonds or government securities. Id. § 713.004(a). The principal of the trust must be kept intact and is not available for use by the municipality, and the income of the

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1. The reference to a "municipality" in section 713.002 includes home rule, general law, and special law cities. Local Gov't Code § 1.005(3) (definition of "municipality").

fund must be used to maintain "in a first-class condition" the grave, lot, or burial space for which the funds were donated. Id. § 713.004(b), (c). The municipality may include in its annual budget an amount necessary for cemetery maintenance and may levy a tax on all property in the city for cemetery maintenance in an amount not to exceed five cents for each \$100 valuation. Id. § 713.006.

Your brief points out that article 969c-1, now codified as section 713.008 of the Health and Safety Code, authorizes a city in a county with a population of 120,000 to 128,000 according to the most recent federal census to terminate its perpetual trust fund and use all money in the fund for permanent improvements to the cemetery. A check of 1980 census figures shows that Grayson County does not fall within the population bracket of the statute. The brief concludes that the express provision for the termination of perpetual trusts by certain cities means that all other cities may not terminate perpetual trusts. Bearing in mind, however, the principle that a general law acts only to limit and not grant home rule cities the powers described in the law, Lower Colorado River Auth. v. City of San Marcos, supra, we think article 969c-1 should be read as specific direction to home rule cities in the affected counties to dispose of perpetual care trust funds in a particular way. Thus, in answer to one of the questions posed by the brief, the enactment of article 969c-1 does not itself preclude home rule cities in counties outside its population bracket from attempting to terminate perpetual care trusts.

That said, it remains to be seen whether any other law limits the power of a home rule city to terminate a perpetual care trust. We believe that such limitations are found in the provisions of the Texas Trust Code, subtitle B of title 9 of the Property Code.

As noted earlier, the perpetual care trust fund of the city of Sherman was established pursuant to article 912a-15, V.T.C.S., now sections 712.021 to 712.029 of the Health and Safety Code. Section 712.021(e) of the code provides that a perpetual care trust fund established by a cemetery association is governed by the Texas Trust Code. Assuming the character of the trust has not changed, we can discern no reason why the city of Sherman's perpetual trust for cemetery maintenance should not continue to be subject to the Texas Trust Code. See Prop. Code §§ 111.003 (what constitutes a trust for purposes of the Trust Code); 111.004(4) (definition of express trust).

Section 112.052 of the Property Code provides:

A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. If an event of termination occurs, the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries. The continued exercise of the trustee's powers after an event of termination does not affect the vested rights of the beneficiaries of the trust.

Section 112.054(a) of the Property Code authorizes a court, on petition of a trustee or beneficiary, to order that a trust be terminated, among other actions, if

(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; or

(2) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.

The court must exercise its discretion in the manner that conforms as nearly as possible to the intention of the settlor of the trust. Prop. Code § 112.054(b).

In our opinion, the city of Sherman may not terminate the trust under section 713.008 of the Health and Safety Code. It may terminate its perpetual care trust fund if the trust by its terms provides for either a specified period of duration and that period has elapsed<sup>2</sup> or a specific event of


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2. Trusts for the perpetual care of cemetery grounds are generally characterized as charitable trusts. See Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675 (Tex. 1981) (construing art. 912a-15); Bogert, The Law of Trusts & Trustees § 377 (2d ed. 1977). Charitable trusts are not subject to the rule against perpetuities. Prop. (Footnote Continued)

termination and that event has occurred. Alternatively, the city may petition a court of appropriate jurisdiction to terminate the trust pursuant to section 112.054 of the Property Code.

Very truly yours,

  
Sarah Woeik, Chief  
Letter Opinion Section

  
Rick Gilpin, Chairman  
Opinion Committee

Prepared by: Steve Aragon

APPROVED: OPINION COMMITTEE

SW/RG/SA/mc

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(Footnote Continued)

Code § 112.036. See Tex. Const. art. I, § 26 (rule against perpetuities). Thus, the law anticipates that a perpetual trust fund will be of indefinite duration. Cf. Foshee v. Republic Nat'l Bank, supra; 47 A.L.R.2d 596 (validity of trust for the maintenance or care of private cemetery lots); Bogert, supra.